Supreme Court, U.S.
FILED
JAN 27 1986
JOSEPH F. SPANIOL, JR.
CLERK

85-1271

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

COVENANT COMMUNITY CHURCH,
Appellant,
VS.
TOMMY LOWE, KNOX COUNTY CLERK,
Appellee

JURISDICTIONAL STATEMENT

ON APPEAL FROM THE SUPREME COURT OF TENNESSEE

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1505 CUMBERLAND AVENUE
KNOXVILLE, TENNESSEE 37996-1800
Counsel for Appellant

December 1985

QUESTIONS PRESENTED

1. Does 1982 TENN. PUB. ACTS ch. 847, as applied to appellant church, violate the Free Exercise Clause of the First Amendment of the United States Constitution?

2. Does 1982 TENN PUB. ACTS ch. 847, as applied to appellant church, violate the Establishment Clause of the First Amendment of the United States Constitution?

3. Does 1982 TENN. PUB. ACTS ch. 847, as applied to appellant church, violate the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution?

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OPINIONS BELOW

The opinion of the Supreme Court of Tennessee, of October 28, 1985, is not yet reported. Copies of the decree, A.2, and opinion, A.5, are attached. The decree and opinion of the Chancery Court of Knox County Tennessee are not reported and are attached. A.18, 21.

JURISDICTIONAL STATEMENT

Appellant appeals from the decree of the Supreme Court of Tennessee entered October 28, 1985 holding that 1982 TENN. PUB. ACTS ch. 847, as applied in this case, is not invalid as a violation of the Free Exercise and Establishment Clauses of the First Amendment and the Equal Protection Clause of the Fourteenth Amendment. The decree of the Tennessee Supreme Court of October 29, 1984 affirmed

a decree of the Chancery Court of Knox County entered October 29, 1984 and is the final decree of the highest court of the State of Tennessee.

The jurisdiction of the Supreme Court to review the final decree of the Supreme Court of Tennessee is invoked pursuant to 28 U.S.C. § 1257(2). See, e.g., McDaniel v. Paty, 453 U.S. 618 (1978).

STATUTES INVOLVED

The validity of 1982 TENN. PUB. ACTS ch. 847, as applied to appellant, has been challenged in this case. This act is a state law of local application affecting Knox County only, and it was duly ratified by Knox County in accordance with TENN. CONST. art. 11, § 9 (home rule). Chapter 847 of the 1982 Tennessee Public Acts has been reprinted in full in the Appendix.

A.38. The scope of the challenged act was succinctly stated by the Tennessee Supreme Court:

> ....Pursuant to Chapter 847 of the Public Acts of 1982, a 5% privilege tax was placed on the occupancy of hotel and motel rooms in Knox County.
>
> ...The tax is levied "upon the privilege of occupancy in any hotel by a transient" in the amount of 5% of the consideration charged by the operator. The proceeds of the tax are to be used to promote tourism, to fund a tourist commission, and to defray the "costs of constructing, acquiring, maintaining and operating tourist related facilities" such as the University of Tennessee sports arena.

Covenant Community Church v. Lowe at A.7.

STATEMENT OF THE CASE

Covenant was organized in a private home in South Knoxville in August 1978 and held its services first in private homes and then in the Knoxville Community Center on Old Maryville Pike from February 1979 through December 1982.

In January 1983, Covenant contracted with a motel in Knoxville, Tennessee, Howard Johnson's North, for a conference room for its weekly, Sunday morning religious services and for motel rooms for its Sunday School children's program. The space rented by Covenant from the Howard Johnson's Motel has been used exclusively for purposes of religious worship and instruction.

The manager of the Howard Johnson's Motel refused to confirm the reservations requested by Covenant without payment of

the 5% tax imposed by TENN. PUB. ACTS ch. 847.

Prior to filing this action, members of Covenant sought relief from the tax by appearing before the Knox County Commission and by petitioning the Knox County legislative delegation, but to no avail.

The pastor of Covenant, Rev. Mitchell Mundy, wrote three letters of protest to the Knox County Clerk, Mr. Lowe, dated January 31, 1983, March 14, 1983 and March 21, 1983. R.41, 42, 43. As a result, an opinion of the Attorney General of Tennessee was requested by the Knox County Department of Law concerning the validity of the hotel-motel tax as applied to Covenant. R.44.

The Knox County Law Department advised Covenant on March 24, 1983 that it

> . . . has two options:

1. continue to pay the tax under protest until we receive the Attorney General's Opinion.

2. Elect not to pay the tax pending the Attorney General's Opinion but face the risk of having to pay a penalty and interest.

On July 15, 1983, the Attorney General of Tennessee published Opinion No. 259 declaring the validity of the 5% hotel-motel privilege tax as applied to Covenant. R.57.

All of the privilege taxes paid by Covenant on the rental of motel facilities for its religious worship have been paid under protest. A.7. The privilege taxes paid by Covenant from January 1983 through April 1984 totaled two hundred one dollars ($201.00). Covenant correctly followed all state procedures necessary for

obtaining a refund with interest for taxes paid under protest.

Covenant is one of several emergent churches which are renting or have rented facilities for the purpose of religious worship in Knox County. R.48.

Covenant has about forty adults actively involved in the attendance of its Sunday morning worship. Its membership consists predominately of young people in their twenties or early thirties. Covenant is an outgrowth of the activities in the Worldwide Discipleship Association (hereafter Worldwide) at the University of Tennessee through which most of the members of Covenant became acquainted with each other. Covenant has declined denominational affiliation and has elected to remain an independent Bible church.

Rev. Mitchell Lee Mundy is pastor of Covenant and is a former member of the

staff of Worldwide. Rev. Mundy decided that he would have to tell the numerous non-students participating in Worldwide's campus program either that "you are not college students and we can not serve you" or "we will have to start a church." Rev. Mundy consulted with Rev. Jess Fletcher, pastor of the First Baptist Church of Knoxville of which he was a member, Rev. John Stone of the Berean Bible Church and Rev. Dick Allison of the South Knoxville Baptist Church. Their response was: "It looks like the Lord is leading you to start a church."

Appellant church operated at a deficit of approximately seventy dollars for a month for the nine months preceding the filing of its complaint. It owns no real property. Its only asset aside from hymnals and religious artifacts is a 1963 Plymouth van which it purchased for

twenty-five dollars. At the time of filing of the complaint appellant church had approximately one thousand dollars in a separate building fund to which its members have earmarked contributions for the construction of a church.

Covenant Community Church (hereafter Covenant) filed a complaint in this action in the Chancery Court of Knox County Tennessee on November 21, 1983. The suit was for the "recovery of taxes illegally assessed by defendant." R.1. Covenant sought a declaratory judgment that, as applied to it, 1982 TENN. PUB. ACTS ch. 847 violates the Free Exercise, Establishment and Equal Protection Clauses of the United States Constitution. R.1, 3. Relief was sought pursuant to TENN. CODE ANN. § 67-2303, replaced by § 67-1-901 (1983)(payment of taxes under protest).A.32. Covenant filed in the state

court under the compulsion of 28 U.S.C. § 1341, but requested relief pursuant to 42 U.S.C. §§ 1983 and 1988. R.1.

Covenant's complaint was verified and filed under the pauper's oath. R.7. On November 21, 1983 the Chancellor entered an order allowing Covenant to proceed under the pauper's oath. R.12.

On January 9, 1984, defendant Lowe moved to dismiss the complaint for failure to state a claim and for the alleged lack of jurisdiction of Tennessee courts over civil rights claims under 42 U.S.C. § 1983. R.13. See Chamberlain v. Brown, 442 S.W. 2d 248 (Tenn. 1969).

Covenant filed a motion for summary judgment on January 16, 1984. R.21.

On April 24, 1984, defendant Lowe filed an answer. R.27. On the same day the chancellor entered an order overruling the motion to dismiss the complaint for

failure to state a claim and reserving judgment on the motion to dismiss for lack of subject matter jurisdiction. R.62.

The case was heard before the Chancellor on April 24, 1984 and submitted on an agreed statement of facts. The Chancellor filed a memorandum opinion on September 12, 1984 rejecting Covenant's constitutional claims and dismissing the suit. A.21. On October 29, 1984, the Chancellor entered judgment in favor of defendant Lowe in accordance with his memorandum opinion of September 12, 1984. A.18.

On November 21, 1983, Covenant moved for leave to proceed in forma pauperis on appeal and on November 28, 1984, the chancellor granted that motion. R.68, 71.

Covenant filed a notice of appeal to the Tennessee Supreme Court on November 28, 1984. A.16.

The Tennessee Supreme Court heard oral argument on September 6, 1985 and entered a decree and opinion on October 28, 1985 affirming the judgment of the Chancellor. A.2, 5.

Covenant filed a notice of Appeal to the United States Supreme Court with the Clerk of the Tennessee Supreme Court on November 7, 1985. A.1.

THE QUESTIONS PRESENTED ARE SUBSTANTIAL

Covenant "rents motel rooms solely for religious worship and instruction" and attacked the validity as applied to it of a "privilege tax . . . on the occupancy of hotel and motel rooms." Covenant Community Church v. Lowe, A.7. In upholding 1982 TENN. PUB. ACTS ch. 847, the Tennessee Supreme Court misapplied this Court's holding in Murdock v Commonwealth of Pennsylvania, 319 U.S. 105, 112(1943) and Braunfeld v. Brown, 366 U.S. 599, 606 (1961).

The Tennessee Supreme Court upheld the privilege tax challenged by Covenant on the ground that the

> . . . challenged ordinance [in Murdock] was quite different 'from a tax on the income of one who engages in religious activities or a tax on property used or employed in connection with those activities.'

Covenant Community Church v. Lowe, A.10. The Knox County privilege tax on motel rooms used solely for religious worship and instruction amounts to a tax on "the privilege of delivering a sermon" and cannot survive scrutiny under Murdock v. Commonwealth of Pennsylvania, 319 U.S. at 112. Accord, Follett v. Town of McCormick, 321 U.S. 573(1944). The religious worship in this case takes place in rented motel rooms, not from door to door as in Murdock, but this

> form of religious activity occupies the same high estate under the First Amendment as do worship in the churches and preaching from the pulpits. It has the same claim to protection as the more orthodox and conventional exercises of religion.

Murdock v. Commonwealth of Pennsylvania, 319 U.S. at 109. There is no material legal difference between the privilege tax here and the license tax in Murdock. In both cases, a tax is exacted "as a condition to the pursuit of . . . [religious] activities." Murdock v. Commonwealth of Pennsylavania, 319 U.S. at 110. The privilege tax in this case offends the free exercise clause because, like the license tax in Murdock, it is a "flat tax imposed on the exercise of a privilege granted by the Bill of Rights."

Murdock v. Commonwealth of Pennsylvania, 319 U.S. at 113.

The privilege tax here is not saved by the fact that "it applies equally and uniformly to all parties who choose, as Covenant has done, to make use of hotel and motel rooms." Covenant Community Church v. Lowe, A.15. The allegedly equal and uniform incidence of the privilege tax in this case, like the "'nondiscriminatory'" ordinance in Murdock, is "immaterial"; both taxes must fail because they do not accord delicate rights of free exercise of religion the "preferred position" to which they are entitled. Murdock v. Commonwealth of Pennsylvania, 319 U.S. at 115.

The ordinance overturned in Murdock "[set] aside the residential areas as a prohibited zone, entry of which is denied . . . unless the tax is paid." The

prohibited zone in this case are hotel and motel facilities necessary to Covenant's religious worship.

The Murdock dictum approving "'a tax on property used or employed in connection with those [religious] activities'" upon which the Tennessee Supreme Court relied, Covenant Community Church v Lowe, A.9., was intended to assuage the anxieties of those who feared

> . . . we have opened the door to exemption of wealthy religious institutions, like Trinity Church in New York City, from the payment of taxes on property investments from which support is derived for religious activities . . . arising out of extensive holdings of commercial property and business activities related thereto.

Follett v. Town of McCormick, 321 U.S. 573, 579 (Murphy, J., concurring)(emphasis added).

The tax in the instant case is distinguishable from the tax approved in United States v. Lee, 455 U.S. 252(1982) because it falls on religious activity--not on commercial activity as in Lee. But see Opinion No. 259 of the Attorney General of Tennessee, July 15, 1983 at R.57.

The privilege tax on Covenant's rental of facilities for religious worship also violates the Establishment Clause. The effect of the challenged statute is to penalize fledgling or impecunious religious groups such as Covenant. This, coupled with the exemption of TENN. CODE ANN. § 67-5-212 (1983) on property owned by religious groups, constitutes an impermissible preference in favor of

churches which own their places of worship. Cf. Larson v. Valente, 456 U.S. 228 (1982), Braunfeld v. Brown, 366 U.S. 599 (1961) and Torcaso v. Watkins, 367 U.S. 488 (1961).

The Establishment Clause plainly proscribes "religious discrimination." Sherbert v. Verner, 374 U.S. 398, 406 (1963). When the effect of the law, as here, is "to discriminate invidiously between religions, that law is constitutionally invalid even though the burden may be characterized as being only indirect." Braunfeld v. Brown, 366 U.S. at 607. Considered in context, the Murdock dictum affirming the right of the state to tax commercial property of churches provides no support for sustaining a privilege tax on the use of property for religious worship. The challenged tax injures free exercise

interests of appellant church by taxing its tithes and offerings. See Malachi 3:8-10.

The reliance of the Tennessee Supreme Court and the Chancellor on Braunfeld v. Brown, 366 U.S. 599 (1961), is misplaced. Braunfeld is plainly distinguishable; the effect in Braunfeld was "indirect" and implicated only the secular interest of Orthodox Jews "to earn a livelihood." Braunfeld v. Brown, 366 U.S. at 601. In contrast, the instant case involves the power of the state to exact a tax on the religious practices of Covenant and on the religious tithes and offerings of its members.

The challenged tax likewise carries with it the threat of "entanglement" of religion and government. See Walz v. Tax Commission, 397 U.S. 664 (1970). The petitions for legislative exemption

directed to Lowe are the type of denominationally oriented political activity for which the Establishment Clause should provide a shield. R.41-43.

The privilege tax in this case likewise offends the Equal Protection Clause. Tennessee invidiously discriminates among churches in Knox County on the basis of their property ownership. Religious corporations which <u>own</u> their places of worship are accorded tax-exempt status under TENN. CODE ANN. § 67-5-212 (1983) while emergent, impecunious groups like Covenant which <u>rent</u> their places of worship are required to pay a privilege tax under 1982 TENN. PUB. ACTS, ch 847. No compelling interest supports the state discrimination among churches on the basis of property ownership.

The instant tax is invalid as applied because it invidiously discriminates among religious groups because of their ownership of property. It is impermissible for the state to impose property ownership restrictions on the exercise of fundamental rights. See, e.g., Kramer v. Union Free School District, 395 U.S. 621 (1969)(invalidating law limiting the franchise in school board elections to those who own or lease property); Phoenix v. Kolodziejski, 399 U.S. 204 (1970)(invalidating on equal protection grounds state statute permitting only real property taxpayers to vote on "general obligation bonds"). The challenged tax cannot be lawfully applied to appellant because our constitutional system does not countenance allocation of fundamental rights according to "financial means" tests. See e.g., Matthews v.

Little, 306 F. Supp. 925, stay granted 396 U.S. 1223 (1969) and Lubin v. Panish, 415 U.S. 709 (1974)(filing fees for public office held violative of Equal Protection Clause) and Griffin v. Illinois, 351 U.S. 12 (1956)(right of indigent defendants to transcripts for appeal). Cf. Boddie v. Connecticut, 401 U.S. 371, 380-82 (1971)(due process precludes states from limiting divorce court access to persons able to afford filing fee).

CONCLUSION

For these reasons, counsel would urge that probable jurisdiction be noted and this case be given plenary consideration by the Court.

Respectfully submitted,

Frederic S. Le Clercq

1505 W. Cumberland Avenue
Knoxville, Tennessee 37996-1800

CERTIFICATE OF SERVICE

I certify that three copies of this jurisdictional statement have been served on Geoffrey P. Emery, Esquire, Counsel for appellee, by the United States mail on this the _____ day of November 1985.

Frederic S. Le Clercq

APPENDIX

APPENDIX A-1

Notice of Appeal to the
United States Supreme Court

November 7, 1985

IN THE SUPREME COURT
OF TENNESSEE

Covenant Community Church, Appellant	)	NOTICE OF APPEAL TO THE UNITED STATES SUPREME COURT
v.	)	
Tommy Lowe, Knox County Clerk, Appellee	)	No. 259 Knox Chancery

Comes now appellant through counsel and gives notice of its appeal pursuant to 28 U.S.C. § 1257(2) from the final decree of this Court entered in the above styled civil action on October 28, 1985.

S/_____
Frederic S. Le Clercq
Attorney for Appellant
1505 W. Cumberland Ave.
Knoxville, TN 37996-1800

APPENDIX A-2

Decree of the Supreme Court
of Tennessee

October 28, 1985

SUPREME COURT OF TENNESSEE, AT KNOXVILLE
SEPTEMBER TERM 1985
Filed October 28, 1985
John A. Parker, Clerk

DECREE

COVENANT COMMUNITY CHURCH,
APPELLANT

Knox Equity
(No. 80651)

Vs.

TOMMY LOWE, KNOX COUNTY CLERK,
APPELLEE

Affirmed &
Remanded

This cause coming on to be heard upon a transcript of the record from the Chancery Court of Knox County, assignments of error, reply brief and argument of counsel, upon consideration whereof the

Court is of opinion that in the decree of the Chancellor there is no error.

It is therefore ordered and decreed by the Court that the decree of the Chancellor be in all things affirmed and that this cause be and hereby is remanded to the Chancery Court of Knox County for enforcement of the judgment of the trial court here affirmed and for such further proceedings as may be necessary consistent with the Opinion of this Court, a copy of which shall accompany the procedendo on the remand to the trial court.

Costs of the appeal are adjudged against the Appellant, Covenant Community Church, for which let execution issue. This cause is remanded to the trial court aforesaid for the collection of the costs adjudged therein, in the manner provided by law.

Robert E. Cooper, C.J.

Wm. H. D. Fones, J.

Ray L. Brock, Jr., J.

William J. Harbison, J.

Frank F. Drowota, III., J.

APPENDIX A-3

Opinion of the Supreme Court
of Tennessee

October 28, 1985
IN THE SUPREME COURT OF TENNESSEE

AT KNOXVILLE

RECOMMENDED

FOR PUBLICATION

COVENANT COMMUNITY CHURCH,	)	
APPELLANT	)	
VS.	)	KNOX CHANCERY FREDERICK MCDONALD, CHANCELLOR
TOMMY LOWE, KNOX COUNTY CLERK,	)	
APPELLEE	)	

For Appellant:

Frederic S. Le Clercq
Knoxville, Tennessee

For Appellee:

Geoffrey P. Emery
Deputy Law Director
Knox County Law Director
Knoxville, Tennessee

AFFIRMED

COOPER, C.J.

O P I N I O N

The issue for review is whether a privilege tax on the occupancy of hotel and motel rooms violates the free exercise or establishment clauses in the First Amendment of the Constitution of the United States, or the equal protection clause of the Fourteenth Amendment, when applied to a church which rents motel rooms solely for religious worship and instruction. We find no constitutional infirmity, and we affirm the decision of the chancellor upholding the tax and denying a refund.

Plaintiff, Covenant Community Church (Covenant), rents rooms each Sunday from a Howard Johnson Motel in Knoxville exclusively for religious purposes. Pursuant to Chapter 847 of the Public Acts of 1982, a 5% privilege tax was placed on the occupancy of hotel and motel rooms in

Knox County. Covenant paid this tax as part of the bill for the use of the rooms. The parties have stipulated that all of the taxes were paid under appropriate protest. Covenant then filed suit in chancery court seeking a refund and a declaration of the invalidity of the tax as applied to it. Covenant does not challenge the validity of the tax except on the constitutional ground previously stated.

Chapter 847 of the Public Acts of 1982 was enacted "to provide for a privilege tax on the occupancy of hotel rooms or ground space" in Knox County. The tax is levied "upon the privilege of occupancy in any hotel by a transient" in the amount of 5% of the consideration charged by the operator. The proceeds of the tax are to be used to promote tourism, to fund a tourist commission, and to

defray the "costs of constructing, acquiring, maintaining, and operating tourist related facilities" such as the University of Tennessee Sports arena.

Covenant first argues that the privilege tax violates the free exercise clause of the First Amendment of the United States Constitution since it is imposed on religious activities and impinges on the church's tenets regarding separation of church and state. Specifically, Covenant argues that the tax "injures economic and free exercise interests of appellant church by taxing its tithes and offerings."

The free exercise clause bars governmental regulation of religious beliefs as such, or interference with the dissemination of religious ideas. Gillette v. United States, 401 U.S. 437, 462, 91 S.Ct. 828, 842, 28 L.Ed.2d

168(1971). However, it does not relieve religious groups from all the financial burdens of government. Murdock v. Commonwealth of Pennsylvania, 319 U.S. 105, 112, 63 S.Ct. 870, 874, 87 L.Ed. 1292(1943). In Murdock, the Court held an ordinance unconstitutional which required colporteurs to pay a license fee as a prerequisite to their distribution of religious literature. The Court noted that the challenged ordinance was quite different "from a tax on the income of one who engages in religious activities or a tax on property used or employed in connection with those activities." Id.

As was stated in Braunfeld v. Brown, 366 U.S. 599, 606, 81 S.Ct. 1144, 1147, 6 L.Ed.2d 563 (1961),

> To strike down, without the most critical scrutiny, legislation which imposes only an indirect burden on

> the exercise of religion, i.e., legislation which does not make unlawful the religious practice itself, would radically restrict the operating latitude of the legislature . . . . The list of legislation of this nature is nearly limitless.

The 5% privilege tax imposed upon a hotel and motel occupancy in Knox County is not a tax on tithes and offerings, as argued by Covenant, nor is it even an indirect tax on tithes and offerings. It is a tax upon the secular activity of occupying a hotel or motel room, and Covenant has freely chosen to occupy such rooms. The act does not bar or limit any religious practice and, thus, we conclude that the free exercise rights of appellant church have not been violated.

Covenant also argues that the privilege tax violates the establishment

clause of the First Amendment by inhibiting religion and threatening government entanglement in religious affairs. In reviewing this issue we first note that total separation of church and state is not possible, and that an inescapable tension exists in trying to prevent the church or the state from intruding upon the other. Lynch v. Donnelly, ___U.S.___, 104 S.Ct. 1355, 1358-59,___L.Ed.2d___(1984). While some tension is inevitable, standards have been developed to determine if the state is intruding upon the affairs of a church in violation of the establishment clause. There is no violation of the establishment clause if a statute has a secular legislative purpose, its principal or primary effect neither advances nor inhibits religion, and it does not foster an excessive government entanglement with

religion. Lemon v. Kurtzman, 403 U.S. 602, 612-13, 91 S.Ct. 2105, 2111, 29 L.Ed.2d 745 (1971).

Applying these standards to the present case, we conclude that no violation of the establishment clause of the First Amendment has occurred. As noted, the primary purpose of the 5% privilege tax is to provide funding for a tourist commission and the promotion of tourism, and to defray costs related to the construction and operation of tourism related facilities. These are purely secular goals. At best, the 5% privilege tax as applied to Covenant is an incidental burden which the church has assumed by its voluntary decision to conduct its services in a motel. It has no practical effect on Covenant's religious practices. Thus, we find that the primary or principle effect of the

privilege tax neither advances nor inhibits religion. Finally, we find no risk of excessive governmental entanglement. The tax is imposed upon the occupancy of space in a hotel or motel, and not upon any religious function. The operator of the hotel or motel is required to collect the tax from the patron, and Section 4(a) of the act places the obligation upon the operator to remit the collected tax to the county. The operator is liable for any penalties or interest that accrue due to delinquency. Since the religious use to which the rooms are put is irrelevant to the impositions of the tax, and since the operator is responsible for remitting the tax to the county, there is no risk of excessive government entanglement.

Finally, Covenant argues that the privileges tax violates the equal

protection clause of the Fourteenth Amendment since it is imposed on poor churches that must meet in rented rooms while churches owning their own land and buildings are, generally, exempt from taxation on real or personal property. See TCA § 67-5-212. These contentions are unsupported by fact or argument. The 5% privilege tax is not imposed upon real or personal property, but only upon the privilege of occupying a hotel or motel room. It is a privilege tax, not a property tax. As such, it applies equally and uniformly to all parties who choose, as Covenant has done, to make use of hotel or motel rooms. This issue is without merit.

The judgment of the chancellor is affirmed. Costs are adjudged against appellant, Covenant Community Church.

S/_____

Robert E. Cooper, C.J.

Concur:

Fones, Brock,
Harbison, and
Drowota, JJ.

APPENDIX B-1

Notice of Appeal to the
Tennessee Supreme Court

November 28, 1984

IN THE CHANCERY COURT FOR
KNOX COUNTY, TENNESSEE

Part I

COVENANT COMMUNITY CHURCH, PLAINTIFF	)	
V	)	No. 80651
TOMMY LOWE, DEFENDANT	)	

NOTICE OF APPEAL

Comes now the plaintiff through counsel and gives notice of its appeal from the judgment entered against it on

October 29, 1984. Pursuant to Tenn. R. App. Pro. 3 and Tenn. Code Ann. § 16-4-108 (1980) plaintiff appeals directly to the Tennessee Supreme Court; the sole and determinative question in this action is the constitutionality of a privilege tax imposed under Public Acts of 1982, Chapter 847. Plaintiff having been granted leave under Tenn. R. App. Pro. 18 proceeds in forma pauperis on this appeal.

S/_____

Frederic S. Le Clercq
Attorney for Plaintiff
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Knoxville, TN 37996-1800

APPENDIX B-2

Judgment of the Chancery Court
of Knox County, Tennessee

October 29, 1984

IN THE CHANCERY COURT OF
KNOX COUNTY, TENNESSEE

Part I

COVENANT COMMUNITY CHURCH

PLAINTIFF

VS. No. 80651

TOMMY LOWE, KNOX COUNTY CLERK,

DEFENDANT

JUDGMENT

This cause came on to be heard on the 24th day of April, 1984 before the Honorable Frederick D. McDonald, Chancellor of the Chancery Court of Knox County, Tennessee, upon the pleadings filed by the parties, the stipulation of facts and exhibits as amended and

statements of counsel, and from the record as a whole from all of which the Court finds that the hotel-motel tax imposed by virtue of Chapter 847 of the Public Acts of 1982 does not violate the Plaintiff's First Amendment rights regarding Freedom of Religion nor does it violate the establishment clause of the United States Constitution.

The Court further finds that Chapter 847 does not violate the Equal Protection Clause of the Constitution. The Findings of Fact and Conclusions of Law are more specifically set forth in a Memorandum Opinion dated September 12, 1984 which is incorporated herein by reference and made a part of the Judgment herein.

Because this cause raises an issue of public importance, the cost of this cause are taxed against the Defendant in his official capacity.

ENTER, this 29th day of October, 1984.
Nunc pro tunc for April 24, 1984.

S/_____
CHANCELLOR

Approved for Entry:

S/_____
Geoffrey P. Emery
Deputy Law Director
Attorney for Defendant

S/_____
Frederic S. Le Clercq
Attorney for Plaintiff

APPENDIX B-3

Memorandum Opinion of the Chancery Court for Knox County, Tennessee

September 12, 1984
IN THE CHANCERY COURT FOR
KNOX COUNTY TENNESSEE

Part I

COVENANT COMMUNITY CHURCH	)	
	)	
	)	
VS.	)	No. 80651
	)	
	)	
LOWE, TOMMY	)	

MEMORANDUM OPINION

Plaintiff, Covenant Community Church, seeks to recover taxes it alleges were illegally assessed against it and collected by Knox County. Plaintiff alleges a violation of its state and federal constitutional rights. Plaintiff relies upon the federal civil rights act 42 U.S.C., sections 1983 and 1988.

Most of the controlling facts are set forth in an agreed stipulation in evidence as Exhibit I. Plaintiff Covenant Community Church is a charitable corporation organized under the laws of the State of Tennessee. It rents space at the Howard Johnson's Motel on Merchants Road in Knoxville, Tennessee. The space rented is used exclusively for purposes of religious worship and Sunday school instruction.

The tax, which Plaintiff has paid under protest and seeks to have declared unconstitutionally assessed as to it, is a 5% hotel-motel tax collected by the motel on the rented facilities. The motel charges Plaintiff $60.00 a week plus the 5% tax.

The tax is imposed under Public Acts of 1982, Chapter 847, which authorizes within Knox County:

> . . . A privilege tax upon the privilege of occupancy in any hotel by a transient in an amount not to exceed the rates provided hereafter . . .

The tax is applicable to Plaintiff, and must be paid unless it violates Plaintiff's rights protected by the First Amendment of the United States Constitution (the establishment and free exercise clause), or the Equal Protection Clause (by denying a church renting space tax exemption as is a church owning its own property.)

Plaintiff urges that the tax violates the second and third of the three tests established by the United States Supreme Court for determing [sic] whether state legislative [sic] impermissibly intrudes upon protected religious rights: first, that the statute have a secular

legislative purpose; second, that its principal or primary effect be one that neither advances or [sic] inhibits religion; and third, the statute must not foster "an excessive entanglement with religion." Lemon v Kurtzman, 403 U.S. 602 (1971).

The tax statute meets the first test. It has a secular purpose: to raise public revenue. Does it advance or inhibit religion? In Murdock v. Pennsylvania, 319 U.S. 105, 112; 87L Ed 1292, 1298, (1943), Justice William O. Douglas, writing for the majority in invalidating a license tax as a condition to pursing [sic] certain religious activity said:

> We do not mean to say that religious groups and the press are free from financial burdens of government. (Citation omitted) We have here something quite different, for

> example, from a tax on the income of one who engages in religious activities or a tax on property used or employed in connection with those activities. It is one thing to impose a tax on the income or property of a preacher. It is quite another thing to exact a tax from for the privilege of delivering a sermon.

Within this view of the extent to which a church may be obligated to pay taxes, the cause of religion is not advanced or inhibited by the tax in question. The tax is equally applicable to others occupying motel space, and no more affects the exercise of religious rights than does the imposition of any other tax on the income or property of a preacher. And finally, the tax does not involve an excessive entanglement with religion inasmuch as the tax applies only to the occupancy of

space, and not to any religious function as such. The tax is not unconstitutional under the three criteria of the United States Supreme Court.

Plaintiff also urges that the tax statute invidiously discriminates between churches in Knox County on the basis of ownership of property. By statute real and personal property owned by a religious institution which is occupied and used for its religious purposes is exempt from property taxation. Plaintiff cites T.C.A. 67-524. See: T.C.A. 67-5-212.

Plaintiff argues that it is taxed on the use of motel space for purely religious purposes, while exactly the same use of a religious building, a church building, is untaxed by virtue of the exemption statute. Plaintiff contends that emergent, impecunious groups like Plaintiff church which rent their places

of worship are required to pay a tax on their place of worship, while churches owning their own places of worship are not.

Not every economic burden resulting from this imposition of a state tax that falls on one church and not another renders the tax unconstitutional. The United States Supreme Court said in Braunfeld v. Brown, 366 U.S. 599, 606 6L Ed 2d 563, 568:

> To strike down, without the most critical scrutiny, legislation which imposes only an indirect burden on the exercise of religion, i.e. legislation which does not make it unlawful, the religious practice itself, would radically restrict the operating latitude of the legislature.

* * * * * *

> Abhorrence of religious persecution and intolerance is a basic part of our heritage. But we are a cosmopolitan nation made up of people of almost every conceivable religious preference . . . . Consequently, it cannot be expected, much less required, that legislators enact no law regulating conduct that may in some way result in an economic disadvantage to some religious sects and not to others because of the special practices of the various religions. We do not believe that such an effect is an absolute test for determing [sic] whether the legislation violates the freedom of religion protected by the First Amendment.

In the present case the tax is in no view confiscatory, and the evidence does not

show it to be an unreasonable burden upon Plaintiff. Indeed, the transitory nature of occupancy of a motel room may be sufficient justification for the difference in tax treatment between motel room occupancy by a church, and permanent ownership of property. Long term ownership of property by a church could become difficult or an impossibility for even churches of significat [sic] financial means, if there were no exemption from property tax. On the other hand, an equivalent affect [sic] on churches, even less affluent churches, using motel rooms, which are taxed only on an "as used" basis as under the disputed tax, does not appear to exist. In this case the weekly tax is only $3.00 under the evidence, not a great burden in this day and age. It is concluded that the claimed discrimination to an unconstitutional extent has not been

shown to exist. The tax is not improper for this reason.

The tax objected to by Plaintiff is found not to be violative of Plaintiff's rights under either the United States or Tennessee Constitutions. Plaintiff's suit must be dismissed.

A judgment in accord with this opinion and incorporating by reference may be entered. Costs are taxed against Defendant in his official capacity, a question of public importance being involved.

Enter this the 12th day of September, 1984.

S/_____
CHANCELLOR

cc: Frederic Le Clercq
Geoffrey Emery
Michael Catalano

APPENDIX C

1. UNITED STATES CONSTITUTION

AMENDMENT 1

Religious and political freedom. -- Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; of the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

AMENDMENT 14

§ 1. Citizenship--Due process of law--Equal protection.--All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of

citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

2. TENNESSEE CODE ANNOTATED

67-1-901. Payment under protest authorized.--In all cases where not otherwise provided in which an officer, charged by law with the collection of revenue due the state, shall institute any proceeding, or take any steps for the collection of the sum alleged or claimed to be due, by said officer, from any citizen, the person against whom the proceeding or step is taken shall, if he conceives the same to be unjust or illegal, or against any statute or clause

of the Constitution of the state, pay the same under protest.

67-5-212. Religious, charitable, scientific, educational institutions.-- (a)(1) There shall be exempt from property taxation the real and personal property, or any part thereof, owned by any religious, charitable, scientific or educational institution which is occupied and used by such institution or its officers purely and exclusively for carrying out thereupon one (1) or more of the purposes for which said institution was created or exists or which is occupied and used by another exempt institution purely and exclusively for one or more of the purposes for which it was created or exists under an arrangement whereunder the owning institution receives no more rent than one dollar ($1.00) per year;

provided, however, that the owing institution may receive a reasonable service and maintenance fee for such use of the property; and provided further that no church shall be granted an exemption on more than one (1) parsonage which shall include not more than three (3) acres of land except as hereinafter provided; and further, that no property shall be totally exempted, nor shall any portion thereof be pro rata exempted unless such property or portion thereof is actually used purely and exclusively for religious, charitable, scientific or educational purposes.

(b)(1) All such institutions so claiming exemption under this section shall be required to make application for such exemption to the assessor of property upon a proper form prepared by the state

board of equalization and supplied by the assessor of property, and the completed form shall show ownership, estimated value, description and location of property, the purposes for which the property is used, and such other information as may be required by either the state board of equalization or the local assessor of property. No exemption shall be granted unless and until the same is approved in writing and signed by the executive secretary or staff attorney of the state board of equalization. The assessor of property shall maintain on file all applications which are approved for exemption.

(2) Upon approval for exemption from property taxation it is not necessary that the institution owning such property make application for such exemption each year; provided, however, that such institutions

promptly report to the assessor of property any change in the use of such property which affects the exempt status.

(3) The property of any such institution failing to file said application or the property of any such institution filing an application, but failing to qualify for exemption, shall not be exempt from property taxation but shall be assessed and taxed as other similar property; provided that any institution failing to file said application on or before April 1, 1975 shall have the right to an appeal before the state board of equalization upon the filing with the executive secretary of the state board the proper form and application for such exemption. All questions of exemption under this section shall be subject to review and final determination by the state board of

equalization, provided that any determination by the state board of equalization is subject to judicial review by petition of certiorari to the appropriate chancery court.

. . .

(d)(1) The property, or any part thereof, owned by an religious, charitable, scientific or educational membership nonprofit organization shall not be denied exemption because administrative, social or recreational activities of such organization are conducted thereon, where said activities are agencies for the advancement and enlargement of the purposes for which said organizations exist; or where said activities promote the interest of its membership in such organizations.

(2) When property is owned by corporations organized for the exclusive

purpose of holding title to property for use of any organization which itself qualifies for such exemption from taxation under this subsection, only such property or such parts thereof, of the corporation as would be entitled to an exemption under this subsection if owned directly by such organization shall not be denied exemptions.

3. 1982 TENN. PUB. ACTS ch. 847

PUBLIC CHAPTER NO. 847

SENATE BILL NO. 2428

By Ashe, Atchley, Elkins

Substituted for: House Bill No. 2305

By Scruggs, Miller, Bell (Knox), Hudson

AN ACT To repeal Chapter 896 of the Public Acts of 1979, and to substitute in lieu thereof AN ACT to provide for a privilege tax on the occupancy of

hotel rooms or ground space in counties having populations of not less than 300,000 nor more than 350,000, according to the federal census of 1980, or any subsequent federal census; to provide for the levying and collection of the tax and for the distribution of proceeds; to provide for deductions for collecting parties; to require certain records; to provide penalties and interest; to provide for a tourist commission, its membership and function; to provide funding for defraying costs or constructing, acquiring, maintaining and operating tourist related facilities whether constructed, acquired, operated or maintained by a county or a Public Building Authority or whether in conjunction with the State of Tennessee, the U.S.

Government, an agency of either and/or an incorporated municipality located within the county including application of such collections to bond payments, rentals and/or financing payments of such tourist related facilities; to provide for the expiration of the tax in excess of three percent (3%) if contract for initial tourist related facility fails in execution.

BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF TENNESSEE:

SECTION 1. DEFINITIONS. As used in this act, unless the context requires otherwise, the following terms shall have the meanings indicated.

(a) TOURIST COMMISSION. "Tourist Commission" means any tourist commission created in any

county pursuant to the terms of this act.

(b) PERSON. "Person" means any individual, firm, partnership, joint venture, association, social club, fraternal organization, joint stock company, corporation, estate, trust, receiver, trustee, syndication, or any other group or combination acting as a unit.

(c) HOTEL. "Hotel" means any structure or ground space, or any portion of any structure or ground space, which is occupied or intended or designed for occupancy by transients for dwelling, lodging, or sleeping purposes, and includes any hotel, inn, tourist court, tourist camp, tourist cabin, motel or any place in which rooms, lodging or accommodations are furnished to

transients for consideration or any place in which ground space is furnished to transients for consideration or any place in which ground space is furnished to transients for the parking of recreational vehicles, travel trailers, campers or tents for a consideration; provided, however, that "hotel" shall not include any rental to transients of rooms or accommodations in an owner occupied single family residence; in an apartment or condominium where not more than twenty-five percent (25%) of the total units in the complex are rented to transients; in a single family house where each single family dwelling unit occupies a separate lot.

(d) Any county which has not undertaken, or which has not contracted to undertake, construction or acquisition of a tourist related facility within the definition of this act is authorized to levy the tax upon the privilege of occupancy at a rate not to exceed three percent (3%) of the consideration charged by the operator.

SECTION 3. TAX ADDED TO ROOM INVOICE. The tax shall be added by each operator to each invoice prepared by the operator for the occupancy of his hotel, such invoice to be given directly or transmitted to the transient, a copy thereof filed by month and retained as provided by Section 7 hereof.

SECTION 4. REMITTANCE TO TAX COLLECTION OFFICIAL. The tax hereby levied shall be remitted to the county

clerk not later than the 20th day of each month next following collection from the transient by all operators who lease, rent, or charge a consideration for any occupancy by a transient. The operator is required to collect the tax from the transient at the time of the presentation of the invoice for occupancy, whether prior to, during or after occupancy, as may be the custom of the operator. The obligation to the county entitled to such tax shall be that of the operator.

(B) DEDUCTION FOR ACCOUNTING EXPENSE--HOTEL OPERATOR. For the purpose of compensating the operator in accounting for and remitting, the tax levied by this act, the operator shall be allowed two percent (2%) of the amount of the tax due and accounted for and remitted to the county clerk in the form of a deduction

in submitting his report and paying the amount due by him, provided the amount due is not delinquent at the time of payment.

(C) DEDUCTION FOR ACCOUNTING EXPENSE--COLLECTING COUNTY. For the purpose of compensating the county clerk for collecting the tax, the county clerk shall be allowed two percent (2%) of the amount of tax remitted by hotel operators, or $12,000 per annum, whichever is greater.

SECTION 5. OFFER TO ABSORB TAX PROHIBITED. No operator of a hotel shall advertise or state in any manner, whether directly or indirectly, that the tax or any part thereof will be assumed or absorbed by the operator, or that it will be added to the rent, or that, if added, any part will be refunded.

SECTION 6. PENALTIES AND INTEREST FOR DELINQUENCY. Taxes collected by an operator which are not remitted to the county clerk on or before the due dates are delinquent. An operator shall be liable for interest on such delinquent taxes from the due date at a rate of eight percent (8%) per annum and for penalty of one percent (1%) for each month or fraction thereof such taxes are delinquent. Such interest and penalty shall become a part of the tax herein required to be remitted. Willful refusal of an operator to collect or remit the tax is hereby declared to be unlawful and shall constitute a misdemeanor. The willful failure and refusal of the operator to collect or remit as to each individual occupancy by a transient for consideration shall constitute a separate offense.

SECTION 7. RECORDS. It is the duty of every operator liable for the collection and payment of any tax imposed by this act to keep and preserve for a period of three (3) years all records necessary to determine the amount of such tax, which records the tax collection official shall have the right to inspect at all reasonable times.

SECTION 8. ADMINISTRATION. In administering and enforcing the provisions of this act, the tax collection official shall have, in addition to all powers conferred by this act, the powers and duties with respect to collection of taxes provided by law. Upon any claim of illegal assessment and collection, the taxpayer shall have the remedy provided in Tennessee Code Annotated, Section 67-2313, it being the intent of this act that the

provisions of law which generally apply to the recovery of taxes illegally assessed shall apply to the tax collected under the authority of this act. The tax collection official shall possess those powers and duties as provided in Tennessee Code Annotated, Section 67-2301 with respect to adjustment and settlement with taxpayers of all taxes assessed and collected by him in error under the authority of this act and to direct the refunding of same. Notice of any tax paid under protest shall be given the tax collection official, and suit for recovery shall be brought against the tax collection official.

SECTION 9. TOURIST COMMISSION. For the purpose of promoting tourism, the counties are granted the authority to establish a tourist commission. The tourist commission shall be comprised of

seven (7) citizens of the county selected by the county executive of the county and the mayor of the municipality in the following manner:

(1) Four (4) tourist commissioners from a list of six (6) citizens of the county submitted by the hotel and motel association, two (2) of whom shall be appointed by the mayor of the municipality and two (2) by the county executive.

(2) Three (3) tourist commissioners from a list of five (5) citizens of the county submitted by the area chamber of commerce, one (1) of whom shall be appointed by the mayor of the municipality and two (2) by the county executive of the county.

(3) In the event that subsections (1) and (2) of this

Section 9 shall be adjudicated inoperative as violative of any applicable law, seven (7) citizens of the county shall be elected by the board of county commissioners or county legislative body.

(4) The tourist commissioners shall be appointed for a term of three (3) years; provided, however, in making the initial appointments the county executive shall appoint two (2) from the hotel-motel association to serve a two (2) year term and two (2) from the area chamber of commerce to serve a one (1) year term. The mayor of the municipality shall make all initial appointments for a three (3) year term. Vacancies are to be filled in the same manner that original appointments are made but shall be

for the duration of the unexpired term only. Tourist commissioners shall serve without compensation except for reimbursement to them for necessary and reasonable expenses.

(5) The tourist commission shall present an annual budget to the board of county commissioners or county legislative body for approval, amendment, or rejection. The tourist commission is empowered to enter into contracts to fulfill its tourism functions as are properly authorized by the board of county commissioners or county legislative body. All expenditures made shall be in accordance with the budget as approved by the board of county commissioners or county legislative body, but funds cannot be committed

or contracts executed until such funds are held on deposit by the county trustee. Funds not used in any fiscal year will be carried over from year to year and will be at the tourist commission's disposal subject to budget.

(6) The tourist commission shall elect from its membership a chairman and a treasurer and may employ such personnel and make such contracts as are necessary to effectively carry out the purposes of this act. Such contracts may include, but shall not be limited to, the procurement of promotional services, advertising services and other services and materials relating to the promotion of tourism business: provided, however, that contracts of the type

enumerated shall be made only with persons, organizations and firms with experience and qualifications for providing promotional services and materials such as advertising firms, tourist bureaus, chambers of commerce, publishers and printers.

(7) The books of accounting of the tourist commission shall be audited annually by an independent auditor who shall make a report to the board of county commissioners or county legislative body with a copy to the county executive to be filed for inspection by the public.

SECTION 10. EXPENDING AND DISTRIBUTING TAX. The proceeds from the tax levied herein shall be retained by the

county government and distributed and expended as follows:

(a) Any county whose board of county commissioners or county legislative body has levied the privilege tax pursuant to Section 2 of this act at a rate not exceeding three percent (3%) of the consideration charged by the operator, shall distribute and expend the tax proceeds as follows:

(1) Two-thirds (2/3) of the proceeds shall be assessed for the direct promotion of tourism, and shall be held by the county trustee (1) for payment to the tourist commission of its budgeted expenditure, (2) for retirement of any bonds issued

by the county for the acquisition, construction and equipping of a tourist related facility, and for operation and maintenance of the same and (3) for payment of lease or financing obligations to a Public Building Authority operating pursuant to the provisions of the Public Building Authority Act of 1971 to defray costs of its constructing, acquiring, equipping, maintaining and operating a tourist related facility within the definition of this act within such county. The accounting department of the county shall issue warrants for payments of the budgeted expenditures in accordance with

the normal accounting procedures of the county.

(2) One-third (1/3) of the proceeds shall be deposited (1) fifty percent (50%) in the General Fund of the county (2) fifty percent (50%) in the General Fund of the municipality, for use by the respective governments for tourist related grants, for retirement of any bonds issued by the county or municipality for the acquisition, construction and equipping of a tourist related facility, or operation and maintenance therof, and for payment of county or municipal lease or financing obligations to a Public Building Authority to

defray costs of its acquiring, constructing, equipping and operating a tourist related facility.

(b) Any county whose board of county commissioners or county legislative body has levied the privilege tax provided in Section 2 of this act at a rate in excess of three percent (3%) but not exceeding five percent (5%) of the consideration charged by the operator shall cause the tax proceeds in excess of three percent (3%) to be held by the county trustee (1) for retirement of any bonds issued by the county for the acquisition, construction and equipping of a tourist related facility within the definition of this act, and for operation and maintenance of the same

and/or (2) for payment of lease or financing obligations to a Public Building Authority operating pursuant to the provisions of the Public Building Authority Act of 1971 to defray costs of its acquiring, constructing, equipping, maintaining and operating a tourist related facility within the definition of this act within such county. The accounting department of the county shall issue warrants for payments of the budgeted expenditures in accordance with the normal accounting procedures of the county.

(c) The county, by proper resolution of its board of county commissioners or county legislative body, is authorized to contract with any municipality within its

boundaries, with a Public Building Authority and with the U.S. Government and/or the State of Tennessee, or any agency or instrumentality of either, with respect to such tourist related facilities, and to use or pledge such tax collections to the payment of such bonds issued by the county and/or payment of lease or financing obligations to a Public Building Authority for the acquisition, construction, equipping, operating and maintenance of a tourist related facility.

(d) No tax proceeds collected pursuant to this act by either a county or a municipality shall be used to provide subsidy in any form

to any hotel within the definition of this act.

SECTION 11. REMITTANCE TO TRUSTEE. The tax collected by the county clerk shall be remitted by him to the county trustee for distribution in accordance with the terms of this act and the laws of the State of Tennessee.

SECTION 12. TAX IS AN ADDITIONAL TAX. The tax herein levied shall be in addition to all other taxes levied or authorized to be levied whether in the form of excise, license, or privilege taxes, and shall be in addition to all other fees and taxes now levied or authorized to be levied.

SECTION 13. EXPIRATION OF THE INCREASED TAX. If the county shall have contracted for, or shall itself have undertaken, the construction, acquisition or equipping of an initial tourist related facility but which contract or undertaking fails in execution, the authority to levy the tax provided in this act in excess of three percent (3%) shall expire at the end of the earliest fiscal year of the county wherein tax collections shall have provided sufficient funds for discharge of costs, expense and liability for all interim, preliminary and preparatory work incurred by the county, a municipality with which the county has contracted or a Public Building Authority.

SECTION 14. SEVERABILITY. If any provision of this act or the application thereof to any person or circumstance is adjudicated invalid, such invalidity shall not affect other provisions or applications of this act which can be given effect without the invalid provision or application, and to that end the provisions of this act are declared severable.

SECTION 15. LOCAL APPROVAL. This act shall have no effect unless it is approved by a two-thirds (2/3) vote of the board of county commissioners or legislative body of any county to which it might apply prior to December 31, 1982. Its approval or nonapproval shall be proclaimed by the presiding officer of the board of county commissioners or

legislative body and certified by him to the Secretary of State.

SECTION 16. EFFECTIVE DATE. In the event of nonapproval and certification as provided in Section 15 hereof, Chapter 996 of the Public Acts of 1978, as amended by Chapter 433 of the Public Acts of 1979, shall remain in full force and effect, the public welfare requiring it. In the event of approval and certification as provided in Section 15 hereof, this act shall take effect on the first day of the month following such approval and certification, the public welfare requiring it. Chapter 896 of the Public Acts of 1978, as amended by Chapter 433 of the Public Acts of 1979, is repealed effective upon this act becoming effective as provided herein, the public welfare requiring it.

PASSED: April 8, 1982

SPEAKER OF THE SENATE

SPEAKER OF THE HOUSE OF REPRESENTATIVES

APPROVED:

GOVERNOR

Supreme Court, U.S.
FILED
FEB 26 1986
JOSEPH F. SPANIOL, JR.
CLERK

85 - 1271

No.

IN THE
Supreme Court of the United States
OCTOBER TERM, 1985

COVENANT COMMUNITY CHURCH,
Appellant
VS.
TOMMY LOWE, KNOX COUNTY CLERK,
Appellee

MOTION TO DISMISS APPEAL OR MOTION TO AFFIRM JUDGMENT BELOW

ON APPEAL FROM THE SUPREME COURT OF TENNESSEE

GEOFFREY P. EMERY
KNOX COUNTY DEPUTY LAW DIRECTOR
615 CITY-COUNTY BLDG.
KNOXVILLE, TN 37902
Counsel for Appellee

February, 1986

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MOTION TO DISMISS APPEAL OR ALTERNATIVELY TO AFFIRM THE JUDGMENT OF THE TENNESSEE SUPREME COURT

Appellee moves this Court to dismiss the appeal herein pursuant to Rule 16 on the grounds that the appeal fails to present a substantial federal question or alternatively, that the Judgment of the Tennessee Supreme Court should be affirmed on the grounds that the questions on which the decision of the cause depends are so unsubstantial as not to require further argument.

STATUTES

This appeal involves the validity of Chapter 847 of the Tennessee Public Acts of 1982 which has been challenged by the Appellant as being violative of the United States Constitution. The statute is a state law passed by the Tennessee General Assembly but one of local application affecting Knox County, Tennessee only. It has been duly ratified by the Knox County Legislative Body in accordance with Article XI, Section 9 of the Tennessee Constitution. The Act is set forth in part in the Appellant's Jurisdictional Statement, Appendix A-39 through A-65. Portions of Section 1 and Section 2 have been omitted from the statement apparently through oversite. Those Sections are appended to this Motion. See Amended Appendix A-1, A-2. In summary, the Act imposes a privilege tax on the occupancy of hotel or motel rooms in Knox County, Tennessee. The tax which is levied upon the privilege of room occupancy by a transient, as defined in the Act, amounts to 5% of the consideration charged by the hotel or motel operator. The proceeds of the tax are used to promote tourism, to fund a tourist commission, and to defray the cost of constructing, acquiring, maintaining or operating tourist related facilities. The requirement to collect and remit the tax is upon the hotel or motel operator and not upon the occupant of the room.

PROCEEDINGS BELOW

Appellant rents certain rooms at a Howard Johnson Motel in Knoxville for the purposes of holding its Sunday School and Church services. Pursuant to the tax authorized by Chapter 847 of the Public Acts of 1982, a 5% privilege tax was placed on the occupancy of each room by the operator thereof. The Appellant paid the tax under protest. Appellee complied with the request of the Appellant to seek a ruling from the Tennessee Attorney General's Office as to whether or not the tax was constitutional. The ruling of the Attorney General was in the affirmative. Thereafter, Appellant filed suit in Knox County Chancery Court seeking a refund of the taxes paid and a declaration of the invalidity of the tax on constitutional grounds involving the 1st and 14th Amendments. The Knox County Chancery Court in its Decree and Memorandum Opinion dated October 29, 1984 found that the statute did not violate Appellant's First Amendment rights regarding freedom of religion, that it did not violate the Establishment Clause of the United States Constitution and that it did not violate the Equal Protection Clause of the United States Constitution. Appellant then instituted a direct appeal to the Tennessee Supreme Court, which, in an Opinion issued October 28, 1985 reported in 698 S.W.2d 339 held that the privilege tax on the occupancy of hotel and motel rooms as authorized by the challenged statute and which was rented by the Church for religious worship and instruction did not violate the Free Exercise or Establishment Clause of the First Amendment nor the Equal Protection Clause of the Fourteenth Amendment.

ARGUMENT

THE APPEAL FAILS TO PRESENT A SUBSTANTIAL FEDERAL QUESTION

This case presents no substantial federal question that has not been previously decided by this Court. While it is clear that the Free Exercise Clause of the United States Constitution prevents government regulation of religious beliefs or interference with the dissemination

of religious ideas, Gillette v. United States, 401 US 437, 462 (1971), it cannot be asserted as authority to relieve religious groups from all the financial burdens of government. Murdock v. Commonwealth of Pennsylvania, 319 US 112 (1943)

This Court, in Murdock, noted that a tax on the spreading of religious beliefs door to door was quite different from a tax on the income of one who engages in religious activities or a "tax on property used or employed in connection with those activities". Id. The tax in the instant case is levied upon the privilege of occupancy of hotel or motel rooms which is in the nature of a property right rather than a tax on the act of worshipping or the act of preaching itself. The burden, if any is found to exist, is purely an indirect one and one which withstands constitutional scrutiny. As stated in the case of Braunfield v. Brown, 366 US 599, 606 (1961):

> To strike down without the most critical scrutiny, legislation which imposes only an indirect burden on the exercise of religion, i.e. legislation which does not make unlawful the religious practice itself, would radically restrict the operating latitude of the legislature. ...The list of legislation of this nature is nearly limitless. It cannot be expected much less required that legislators enact no law regulating conduct that may in some way result in an economic disadvantage to some religious sects and not to others because of the special practices of the various religions.

Appellant's contention that the challenged statute violates the Establishment Clause of the First Amendment also does not present a substantial federal question. This Court has quite clearly identified the evils against which the Establishment Clause was intended to afford protection and they are (a) sponsorship (b) financial support and (c) active involvement of the sovereign in religious activity. The Court, having defined those evils, has articulated a three-prong test in determining whether the legislation violates the Establishment Clause. They are that the statute have a valid secular legislative purpose, that the act have as its principal or primary effect

one that neither advances nor prohibits religion, and that the statute does not foster an excessive entanglement with religion. Lemon v. Kurtzman, 403 US 602, 612-613 (1971); Board of Education v. Allen, 392 US 236, 243 (1968); Walz v. Tax Commission, 398 US 664, 674 (1970)

There is no question that the statute's purpose of collecting revenues to fund the promotion of tourism and/or to build tourist related facilities is a valid secular purpose. It is equally as clear that the tax has no practical effect on the Appellant's religious practices and thus is one which neither advances nor prohibits religion. Finally, the statute does not foster an excessive entanglement with religion in that the act places the obligation to remit the tax upon the operator of the hotel or motel and under no scenario would the Appellee seek to collect the tax from the church itself. Section 4(a) 1982 Tennessee Public Acts, Chapter 847.

The Tennessee Supreme Court as well as the Chancery Court of Knox County applied the test formulated by this Court for determining violations of the Establishment Clause and both Courts correctly found that the statute in question passed the test. For that reason the Judgment of the Tennessee Supreme Court should be affirmed.

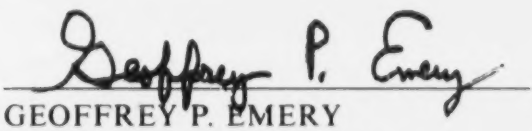
The third issue presented on appeal by the Appellant involves a challenge to the statute on equal protection grounds. This issue also presents no substantial federal question. The Tennessee Supreme Court correctly noted that the tax authorized by the statute is not imposed upon real or personal property but upon the privilege of occupying a hotel or motel room. It is correctly classified as a privilege tax and not a property tax. It applies equally and uniformly to all parties whether religious or secular who on their own volition choose to use a hotel or motel room for any purpose. Appellee takes issue with the statement that groups which "rent their places of worship are required to pay a privilege tax under 1982 Public Acts, Chapter 847". There is no tax authorized under the challenged statute on impecunious church groups which rent houses, community clubs, fraternal organization facilities, commercial facilities or

buildings of other churches because they have no house of worship. The tax is purely a privilege tax upon the occupancy of a hotel or motel room and is not a statute which discriminates against churches on a basis of property ownership.

CONCLUSION

For the aforegoing reasons, Appellee respectfully submits that the questions upon which this cause depend are so unsubstantial as not to require further argument and Appellee respectfully moves this Court to dismiss the Appeal or in the alternative to deny plenary consideration and affirm the Judgment of the Tennessee Supreme Court.

Respectfully Submitted,

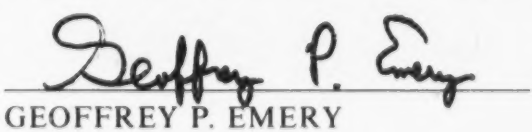


GEOFFREY P. EMERY
DEPUTY KNOX COUNTY LAW DIRECTOR

615 CITY-COUNTY BLDG.
KNOXVILLE, TN 37902
615-521-2327

CERTIFICATE OF SERVICE

I hereby certify that three copies of the foregoing Motion to Dismiss or in the alternative Motion to Affirm Judgment have been served upon Frederic S. Le Clercq, Counsel for the Appellant by depositing same in the United States Mail, postage prepaid, this 25 day of February, 1986.



GEOFFREY P. EMERY

APPENDIX

AMENDMENT TO JURISDICTIONAL STATEMENT APPENDIX

Appellee moves to amend the Jurisdictional Statement as filed by the Appellant by showing to the Court that subsection (b) Section 2 of the 1982 Tennessee Public Acts, Chapter 847 is incorrectly referred to as Section 1(d) and further that subsections (d) through (l) of Section 1 and Section 2(a) have been omitted from the Jurisdictional Statement so that the Jurisdictional Statement Appendix A-44 should be amended to read as follows:

SECTION 1

(d) OCCUPANCY. "Occupancy" means the use or possession or the right to the use or possession of any room, lodging, accommodation or ground space in a hotel for a period of less than thirty (30) continuous days.

(e) TRANSIENT. "Transient" means any person who exercises occupancy, or is entitled to occupancy, of any rooms, lodgings, accommodations or ground space in a hotel for a period of less than thirty (30) days.

(f) CONSIDERATION. "Consideration" means the consideration charged, whether or not received, for the occupancy in a hotel valued in money whether to be received in money, goods, labor, or otherwise, including all receipts, cash, credits, property and service of any kind or nature without any deduction therefrom whatsoever. Nothing in this definition shall be construed to imply that consideration is charged when the space provided to the person is complimentary from the operator and no consideration is charged or received from any person.

(g) OPERATOR. "Operator" means the person operating the hotel whether as owner, lessee, or otherwise.

(h) TAX COLLECTION OFFICIAL. "Tax collection official" means the county clerk of the county.

(i) TOURISM. "Tourism" means the planning and conducting of programs of information and publicity designed to attract to the county tourists, visitors and other interested persons from

outside the area and also designed to encourage and coordinate the efforts of other public and private organizations or groups of citizens to publicize the facilities and attractions of the area.

(j) TOURIST RELATED FACILITY. "Tourist related facility" means any facility relating to tourism including without limitation an arena, theatre, auditorium, stadium, civic center, museum, or convention center.

(k) THE MUNICIPALITY. "The municipality" means the largest municipality by population in any county to which this act may apply.

(l) MAYOR. "Mayor" means the mayor of the largest municipality by population in any county in which this act may apply.

SECTION 2.

LEVY OF TAX. In counties having populations of not less than 300,000 nor more than 350,000, according to the Federal Census of Population of 1980, or any subsequent federal census, there is authorized a privilege tax upon the privilege of occupancy in any hotel by a transient in an amount not to exceed the rates provided hereinafter of the consideration charged by the operator. The rate of the tax in increments of one-tenth (1/10) of one percent (1%) shall be set annually by the board of county commissioners or the county legislative body. The tax is a privilege upon the transient occupying the room or ground space and shall be collected, distributed and expended as hereinafter provided. The maximum rate of such tax shall be determined as follows:

(a) Any county which shall have undertaken, or which shall have contracted for, construction or acquisition of a tourist related facility within the definition of this act is authorized to levy the tax upon the privilege of occupancy at a rate not to exceed five percent (5%) of the consideration charged by the operator.

(b) Any county which has not undertaken, or which has not contracted to undertake, construction or acquisition of a tourist related facility within the definition of this act is authorized to levy the tax upon the privilege of occupancy at a rate not to exceed three percent (3%) of the consideration charged by the operator. (referred to in Jurisdictional Statement as Section 1. (d))